



## EMPLOYER BULLETIN: EMPLOYEE MEDICAL MARIHUANA USE IN MICHIGAN

In December 2008, Michigan joined what is now a group of 16 jurisdictions that, in varying ways, recognize the medicinal use of marihuana. At present, Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington State have medical marihuana statutes. Some of these statutes merely decriminalize medical use while others protect growers, distributors and users. Michigan's Medical Marihuana Act ("MMMA"), effective December 4, 2008, is among the few statutes enacted by these States that have an impact on employment rights.

The MMMA legalizes the use of medically prescribed marihuana by individuals that possess a State issued authorization card for medical marihuana use. The Act provides in relevant part:

Sec. 4. (a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business . . . .

The MMMA also include a wrinkle for employers by providing:

Sec. 7. (c) Nothing in this act shall be construed to require:

\* \* \*

(2) An employer to accommodate the ingestion of marihuana in any workplace or any employee working under the influence of marihuana.

At first blush, this provision appears to provide protection for employers, but it also produces a complication for employers that have zero-tolerance rules for controlled substances.

The complication arises from the absence of any objective standard for "under the influence." Employers are left without any standard when it comes to medical marihuana use and workplace accommodation of medical conditions or disabilities under state and federal laws. Due to the short life of the Act, there are no published decisions from Michigan's state or federal courts concerning application of the MMMA in the workplace.

While the MMMA's "influence" prohibition will eliminate any accommodation of drug use rising to the "influence" level under Michigan's Persons With Disabilities Civil Rights Act ("PWDCRA"), the MMMA provides no guidance for usage above zero-tolerance and no objective standard for what constitutes unsafe levels in the workplace. On the federal side, as long as marihuana use remains illegal under federal law, workplace accommodation for medical marihuana will not be required under the Americans With Disabilities Act, ("ADA"). The ADA definition of a qualified individual with a disability continues to exclude employees "currently engaging in the illegal use of drugs." The illegal drugs definition under the ADA continues to include marihuana. Also, testing for the illegal use of drugs is not considered to be a prohibited medical examination under the ADA. As to employer medical inquiries to existing employees under the ADA, these inquiries can be made, provided that such inquiries are job-related and consistent with business necessity. This statutory policy has been extended to validate an employer's policy that prohibited the abuse of prescribed drugs and required employees to report to supervisors the employee's use of prescription drugs that altered the employee's ability to perform the essential functions of the job. Meyer v. Qualex, Inc., 388 F. Supp. 2d 630, 636-37 (E.D.N.C., 2005). Note that the Qualex drug policy also included a provision that allowed tested employees an opportunity to provide a legitimate explanation for a positive drug test result, before the employer made a decision as to continuing employment.

Resolution of ADA concerns does not address the interaction of Michigan's MMMA and PWDCRA when it comes to medical marihuana use below the "influence" level. The PWDCRA excludes from the definition of a disability any determinable physical or mental characteristic caused by the current use of a controlled substance. At the same time, the MMMA and PWDCRA do not rule out a situation where an employee tests positive for the presence of marihuana but the concentration level does not rise to the level of "working under the influence" of prescribed marihuana. The "under the influence" rule implicitly rejects any blanket zero-tolerance standard banning the presence of any level of marihuana in an employee's system. Accordingly, for employees outside of DOT regulation, employers cannot rely on DOT or Michigan statutory standards for "influence" since they are based on minimum positive test findings that do not provide objective standards for determining actual physical impairment.

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